NASA Procedural Requirements

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COMPLIANCE IS MANDATORY

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Subject: NASA Export Control Program

Responsible Office: Office of External Relations

CHAPTER 3. NASA EXPORT CONTROL PROCESS

3.1 GENERAL

NASA, as a U.S. Government Agency on the leading edge of technological development and international cooperation in space, aeronautics, and a variety of scientific endeavors, must be a responsible exporter. The most significant step in any export activity is to determine if the export is necessary and appropriate from a program standpoint, and in accordance with NASA international policy and with the approved international agreement or international contract. The international agreement's "Roles and Responsibilities" and "Technical Data and Goods" clauses provide important guidance on the scope of exports and transfers that are consistent with the relevant program.

In general, NASA is not responsible for contractors' export compliance in the execution of contracted work (see NFS 1825.1103-70 and 1852.225-70). The exception is an instance in which NASA directs or authorizes a contractor to effect exports using a NASA-obtained IVL or GBL.

3.2 COMMODITY JURISDICTION AND CLASSIFICATION

Once it has been determined that a planned transfer of commodities, technology, or software to a foreign entity is necessary and consistent with NASA policy and the approved international agreement or contract, the next step is to establish if the item is properly listed on the United States Munitions List (USML) or the Commerce Control List (CCL). The USML enumerates the classes of defense articles subject to the licensing authority of DTC. The CCL identifies items subject to the licensing authority of BIS. NASA officials authorized to make this determination include the HEA, CEA's and Program and Project Managers. These individuals can seek advice from manufacturers, engineers, and other qualified, knowledgeable persons to assist in this process. The HEA can also request a Commodity Jurisdiction (CJ) determination from DTC if doubt about proper jurisdiction persists.

3.2.1 Upon a written CJ request from the HEA, DTC will, in consultation with the Departments of Defense, Commerce, and other concerned U.S. Government agencies, provide a determination of whether a specific item is covered by the USML. 22 CFR § 120.4 states the bases upon which a commodity determination is made, and how jurisdictional disputes may be resolved. All CJ requests must come through Headquarters. Generally, NASA does not submit CJ requests. NASA CEA's may always consult with the HEA if questions of jurisdiction arise.

3.2.2 If an item is believed to be under the jurisdiction of the EAR but the exporter is not able to classify the item on the CCL, a classification request can be submitted to the BIS at the Department of Commerce. All NASA classification requests are submitted by the HEA. A complete description of the item, including its intended purpose and all the capabilities the item may have, is required, as well as a suggested Export Control Classification Number (ECCN). BIS will provide a written classification back to NASA, which may include limitations and requirement for reclassification if the item is modified or improved.

3.2.3 With the exception of "publicly available" technical data/technology or software, virtually all commodities, technical data, and software are subject to the export control regulations. If technology, technical data, or software is "publicly available," the export or transfer may be effected to any party (other than U.N.-embargoed countries)

without a license; publicly available technology and software are not subject to export control. Note: Currently, the ITAR states that the performance of defense services or technical assistance relating to any defense article to any foreign party, even when using exclusively publicly available information, is an activity subject to export control. See 22 CFR § 124.1(a).

3.2.4 If the item is not publicly available, it must be classified either under an Export Control Classification Number (ECCN) on the CCL, 15 CFR Part 774, Supp. 1 (see Chapter 4 of this NPG), or under a Category Number on the USML, 22 CFR Part 121 (see Chapter 5 of this NPG). Once properly classified on the CCL or USML, it is relatively easy to determine the applicable IVL, License Exception, or License Exemption requirements for any export.

3.3 FOREIGN PARTNER OR END-USER CREDENTIALS

In any export activity, it is imperative to know the intended end-user. The following points are a valuable guide to establish end-user (foreign partner or contractor credentials).

3.3.1 Check to ensure that the recipient is not a Denied Party (15 CFR § 764, Supp. 2, http://207.96.11.93/DPL/Default.shtm), a Specially Designated National (15 CFR § 764, Supp. 3, http://www.treas.gov/offices/enforcement/ofac/sdn/t11sdn.pdf), a Debarred Party (http://www.pmdtc.org/debar059.htm), or an Entity of Concern (15 CFR § 744, Supp. 4, http://207.96.11.93/Entities/). Normally, only publicly available information should be provided to a recipient identified on any such list. Ability to provide non-publicly available information is determined by requirements. An IVL, License Exemption, or License Exception may be required. Consultation with HEA or CEA, as appropriate, is needed.

3.3.2 Check for "red flags." Refer to BIS' "Know Your Customer" Guidance and Red Flags in §732 Supp 3. When "red flags" are raised by the information provided, NASA officials have a duty to check out suspicious circumstances and inquire about the end use, end user, or ultimate country of destination. Absent any "red flags" in the information provided, there is no affirmative duty to inquire or otherwise verify the foreign party.

3.3.3 Encourage the maximum flow of information. Do not inhibit the flow of information from potential foreign partners in an effort to prevent the discovery of adverse end use, end user, or country of destination. Such actions will not insulate NASA personnel from liability, and will likely be considered an aggravating factor in enforcement proceedings.

3.3.4 Reevaluate any discoveries after inquiry. Inquiry and reevaluation are intended to determine whether there are explanations or justifications for discovered "red flags." If they can be justified, it is appropriate to proceed with the transfer or export. If they cannot be justified, proceeding with the transfer or export may place NASA personnel at risk of having had "knowledge" of a potential violation of the export control regulations.

3.3.5 Consult with CEA, CEC, HEA, or HEC for guidance. If concerns remain about a particular transfer or export, after inquiry and reevaluation, refrain from the transaction, provide all relevant information to the HEA or CEA, and await their determination.

3.3.6 Everyone needs to know how to handle "red flags." Information about proposed transfer/exports must be shared and evaluated by responsible individuals.

3.4 LICENSE REQUIREMENTS

The procedures for determining license requirements are stated in Chapters 4 and 5 of this NPR for exports under EAR and ITAR jurisdictions, respectively. It is possible that certain Exceptions and Exemptions may apply that permit an export without the need of a license; these Exceptions and Exemptions are discussed in sections 4.3.1 through 5.3.1.

3.5 TECHNOLOGY TRANSFER CONTROL PLANS

3.5.1 A Technology Transfer Control Plan (TTCP) is a brief document, intended to serve as an aid and a guide to Program and Project Managers, as well as other NASA officials and contractors involved in an international activity. The TTCP responds to four fundamental sets of questions that NASA officials and contractors working with foreign nationals in a NASA program or project should ask:

1. What technologies, software, or hardware am I working with that are subject to export control?

2. What foreign nationals (and what nations) am I working with?

3. What technologies, software, or hardware do I need to provide to those foreign nationals, according to the agreement or contract governing this activity? Which ones do I need to protect?

4. How will I provide those export-controlled technologies, software, or hardware to those foreign nationals with whom I am working? How will I protect export-controlled technologies, software, or hardware from unauthorized transfer?

3.5.2 If a NASA program or project will not export software or hardware and will disclose only publicly available information to all participating foreign entities, a TTCP would not be necessary or appropriate. However, if a NASA activity will export hardware or software, or will transfer or disclose export-controlled technology or software, to a foreign party, then a TTCP is an appropriate and useful tool to ensure that all persons participating in the activity understand what export-controlled items are involved, what foreign entities are involved, what export-controlled items NASA must provide to those foreign entities under the terms and conditions of the cooperation, and how those items will be transferred to those foreign entities (including the means of transfer and appropriate markings, as required by the governing international agreement or contract).

3.5.3 NASA Program and Project Managers should consult with their CEA's, or the HEA, as appropriate, in the development of TTCP's for their programs that involve foreign participation and exports. A sample TTCP appears in Appendix B of this NPR. NASA Program and Project Managers are also encouraged to consult with their Center Chief Patent Counsel, Software Release Authority and the Innovative Technology Transfer Partnership (ITTP) Program when developing a TTCP.

3.6 RECORDKEEPING

3.6.1 The EAR requires that records be maintained for all exports or transfers of items on the CCL for a period of at least five (5) years beyond the expiration date of the license. See 15 CFR § 762.6. Records must also be maintained when using License Exceptions or EAR-99/NLR.

3.6.2 The ITAR likewise requires that records be maintained for all exports or transfers and imports of items on the USML for a period of five (5) years from the expiration of the license. See 22 CFR §§ 122.5 and 125.6. Records must also be maintained when using License Exemptions.

3.6.3 The statute of limitations for criminal actions under the Export Administration Act (EAA) and the Arms Export Control Act (AECA) is five (5) years. Therefore, it is advisable to retain all export control records for not less than five (5) years after the transfer or expiration of the license. BIS, DTC, and the BICE may inspect records at any time.

3.6.4 Records to be retained include the following in original or copy form: shipping documents (e.g., GBL's, and SED's); validated licenses; letters to NASA contractors by Contracting Officers or their representatives authorizing the use of export license Exceptions or Exemptions; classification determinations by NASA, BIS, or DTC; and records other than SEDs regarding the use of export license Exceptions or Exemptions, where appropriate.

3.7 REPORTING

3.7.1 When preparing Statements of Work and data deliverable requirements, Program and Project Managers shall ensure that the following requirements are included in solicitations, contracts, and grants:

- Requirement for a plan identifying export licenses required for performance, and exemptions and exceptions that will be used;

- Requirement for a status report of licenses obtained, including copies of licenses;

- Requirement for a status report of exports effected against those licenses, including copies of SEDs and other related shipping documents.

These reports shall be delivered to the Program or Project Manager, as appropriate, and to the CEA of the relevant NASA Center, or the HEA at NASA Headquarters, as appropriate.

3.8 ELECTRONIC TRANSMISSION

3.8.1 To the maximum practicable extent, and where feasible, ensure that the confidentiality and integrity of export controlled information exchanged over the internet is properly protected by use of encryption, in accordance with NPR 2810.1.

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